**STATEMENT OF COMMISSIONER ROBERT M. MCDOWELL
DISSENTING**

Re: *The Commission's Cable Horizontal and Vertical Ownership Limits* (MM Docket No. 92-264); *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992* (CS Docket No. 98-82); *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996* (CS Docket No. 96-85); *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests* (MM Docket No. 94-150); *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry* (MM Docket No. 92-51); *Reexamination of the Commission's Cross-Interest Policy* (MM Docket No. 87-154), Fourth Report and Order and Further Notice of Proposed Rulemaking

What we have before today us may be the "Ghost of Christmas Past." Almost seven years ago, the court rejected the FCC's attempt to impose a 30 percent cable ownership cap. So what is the majority doing today? It's sending back up to the very same court the very same 30 percent cap. Maybe this is really the "Ghost of Christmas Present" then. In Charles Dickens' tale, "A Christmas Carol," that ghost carried the specters of "Ignorance" and "Want." Today's order does the same. This order goes out of its way to remain ignorant of current market conditions which obviate a need for a cap. And the order is wanting for any sustainable legal or evidentiary justification to trample on the First Amendment, in defiance of the court's 2001 warning. Certainly, the ghost of the future will foretell an inescapable fate for this order. Its dark, cold epitaph is all but carved on its tomb. This order *will be overturned* by the D.C. Circuit. Even Ebeneezer Scrooge would pry a few coins from his miserly hands to place that bet.

My dissent is focused on three primary concerns:

1) The cap is out-of-date, is bad public policy and is not needed in today's market;
2) The court is sure to strike down the cap again; and
3) The cap is contrary to the existing policy goals of *this* Commission by creating regulatory *dis*parity and asymmetry.

I. The Cap Is Out-of-Date.

In 1992, Congress authorized the Commission, through Section 613, to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach" in order to prevent any "cable operator or group of cable operators" from "unfairly imped[ing]… the flow of video programming from the video programmer to the consumer."[1] In instructing the Commission to craft these rules, however, Congress was clear that the Commission must "make sure such rules and regulations reflect the dynamic nature of the communications marketplace" and must not "impose limitations which would impair the development of diverse and high quality video programming."[2] Congress also required the Commission to "take particular account of the market structure" of the cable industry and

[1] 47 U.S.C. § 533(f)(1)(A), (f)(2)(A).

[2] *Id.* at § 533(f)(2)(E), (f)(2)(G).

"account for any efficiencies and other benefits that might be gained through increased ownership."[3]

When Congress enacted this section, vertical integration between cable operators and programmers was at about 57 percent, which sparked legitimate concerns regarding potential exclusion of independent programmers by cable companies. In contrast, vertical integration today stands at less than 15 percent. The unwritten story here is that, back then, fewer than 100 national programming networks existed; now there are about 550. That's more diversity, not less.

In 1992, the average consumer had a "choice" of only one subscription video provider. Today, the average consumer has a choice of at least three such providers, and sometimes five. In 2001, when the court last looked at the cap, DirecTV and Echostar had a combined 16 million subscribers with an 18 percent market share. Today, they serve over 30 million consumers and have grown to a 30 percent market share. These two companies are now the second and third largest subscription video service providers. DirecTV is now 54 percent bigger, and Echostar is 92 percent bigger. In the meantime, cable's video subscribership is 4 percent *smaller*.

And there are other differences. In 1992 and 2001, phone companies were not in the video business. Now they are - big time. For instance, Verizon alone has almost 1 million video subscribers. Cable overbuilders are much more viable as well. In 1992, there was no public Internet, let alone Internet video. Today there is so much Internet video, that YouTube alone requires more bandwidth than the *entire Internet* did in 2000. And that's not counting new ventures such as Joost, Cinema Now, Movielink and others that allow consumers to avoid traditional subscription video paradigms altogether. In fact, as the FCC's own research shows, by July 2006, 107 million Americans viewed video online and about 60 percent of U.S. Internet users download videos.[4] Furthermore, today's video market will only become more competitive as broadcasters beam new HDTV and multi-cast video programming, over-the-air, for *free*, and as wireless providers build out powerful new platforms using our recently-auctioned Advanced Wireless Services spectrum and the 700 MHz spectrum being auctioned next month.

This order is unnecessary because the bottleneck threat to programming distribution that existed in 1992 no longer exists. Deregulatory policies have spurred new investment and competition in the marketplace. As a result, new delivery platforms and new content providers have sprouted up, supplanting the need for regulation. However, should a programmer find that a cable operator is unfairly excluding its content from carriage, and all other private sector avenues for resolution have failed, then the statute and our regulations allow that programmer to pursue a complaint here at the Commission. But, to date, only two such complaints have been filed—which underscores the point that the majority is concocting an unconstitutional cure for an illness that does not exist. If a viewer wants specific programming not carried by a cable operator, the viewer and the programmer both have a panoply of ways to find each other – certainly more than they had in 1992 or 2001. In short, other less heavy-handed alternatives exist to address the majority's concerns without having to resort to such archaic industrial policy.

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[3] *Id. at* § 533(f)(2)(C)-(D).

[4] News Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* 4 (Nov. 27, 2007).

II. The Cap Is Sure to Be Struck Down Again by the Court.

Today's 30 percent cap has a smaller chance of surviving appeal than did the ill-fated and ill-advised 2001 30 percent cap. In 2001 in *Time Warner Entertainment Co. v. FCC*, the D.C. Circuit rejected the 30 percent cable ownership cap and imposed a heavy burden on the Commission to adopt any new cap on remand.[5] The court found that the Commission lacked an evidentiary basis for a 30 percent cap and, as a result, did not meet its obligation under the First Amendment to show a "real risk" of "non-conjectural harm" to programmers. The court also rejected the Commission's argument that a 30 percent cap was justified in order to "enhance diversity."

Indeed, the court stated that based on the marketplace evidence in 2001, the Commission could justify *at most*, a 60 percent cap—*twice* the number the majority adopts today.[6] Specifically, the court maintained that a 60 percent limit "might be appropriate as necessary to ensure that programmers had an adequate 'open field' even in the face of rejection by the largest company" and that the "present record supports no more." In particular, the court found that the Commission had not given sufficient weight to marketplace developments, especially the increasing success of Direct Broadcast Satellite ("DBS"). The court pointed out that because "DBS could be considered to 'pass every home in the country'" its competitive effect is especially significant. The Court admonished the Commission to account for this fact when considering any new ownership cap. The majority's order does not clear this hurdle, not by a mile. How can the same 30 percent limit that *insufficiently* accounted for DBS in 2001 possibly satisfy the requirements of *Time Warner II* today when DBS is roughly *twice as large* a competitive presence as it was in 2001, and when other competitors are competing vigorously with cable operators? The answer is that it cannot.

III. The Cap Creates Regulatory *Dis*parity and Asymmetry.

Placing a horizontal ownership cap on cable creates regulatory disparity and asymmetry, all at a time when this Commission has been trying to level the regulatory playing field by creating parity. Order after order over the past few years has sought to change the stove-pipe paradigm of old in an attempt to treat similar technologies and services alike, not differently. Today's cap applies only to cable, not to satellite. Furthermore, we don't cap the number of:

- wireline telephone subscribers one company can have;
- wireless subscribers one company can have; or
- websites a company can own.

Even in the era of rapid technological convergence, such asymmetry will only create market distortions that will inhibit investment and innovation. How does that serve the public interest? In a world where cable companies compete directly against telephone companies and others to provide video, voice and data services, restricting the ability of one group of competitors to achieve the economies of scale enjoyed by others undermines years of efforts to

[5] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C.Cir. 2001).
[6] *Id.* at 1136.

spur intermodal competition and violates the well-established principle of competitive neutrality. If the majority sees so many flaws in the cable industry, it should remedy those shortcomings by encouraging competition, as we did with our video franchising order, not through unnecessary and unconstitutional regulation. Likewise, it is ironic that those who are voting today to *limit* cable company growth have consistently voted to *expand* telephone company growth. Such a reversal of policy just for this one sector defies logic.

IV. **Conclusion**.

Today's item also contains a further notice of proposed rulemaking, seeking comments regarding the cable attribution rules and the vertical ownership limit. While I am not opposed to asking questions about the attribution issues, the answers will make little sense with the 30 percent horizontal ownership cap in place. I hope that our consideration of the vertical limit will be far better-reasoned than today's action.

For these reasons, I respectfully dissent from today's order.